In the Matter of the Compensation of
JAMES HIBBS, Claimant
WCB Case No. 21-02985
ORDER ON REVIEW
Julene M Quinn LLC, Claimant Attorneys
Babcock Holloway Caldwell & Stires, Defense Attorneys

Reviewing Panel: Members Ousey and Curey.

Claimant requests review of those portions of Administrative Law Judge (ALJ) Sencer's order that: (1) declined to award additional temporary disability benefits from June 1, 2017 through November 29, 2017, and from May 1, 2018 through April 29, 2021; and (2) did not award penalties or penalty-related attorney fees for the self-insured employer's allegedly untimely payment of such benefits. The employer cross-requests review of those portions of the ALJ's order that awarded additional temporary disability benefits from November 29, 2017 through April 30, 2018, and from April 30, 2021, until such benefits could be properly terminated. On review, the issues are temporary disability, penalties, and attorney fees. We affirm in part and modify in part.

FINDINGS OF FACT

We adopt the ALJ's "Findings of Fact" with the following summary and supplementation.

Claimant was compensably injured on January 19, 2016. (Ex. 1). The employer initially accepted a disabling cervical strain and concussion. (*Id.*)

A July 2016 Notice of Closure awarded temporary disability benefits from January 19, 2016 through February 10, 2016, February 11, 2016 through March 22, 2016, and March 23, 2016 through April 18, 2016. (Ex. 6-4).

Claimant testified that he stopped working for the employer in June 2017 because he could no longer perform his regular job duties due to mental fogginess and confusion that arose following the January 19, 2016, work injury. (Tr. 13-14).

In November 2017, claimant sought treatment with Ms. Reffel, a nurse practitioner, for stress-related gastrointestinal (GI) symptoms. (Ex. 7-1). She stated that claimant's symptoms were consistent with an unspecified anxiety disorder. (Ex. 7-3). Ms. Reffel provided claimant with regular treatment through

November 6, 2020, and considered herself primarily responsible for the treatment of his psychological conditions during this period. (Exs. 11, 15, 23, 29, 33, 36–42, 48-1).

On December 13, 2017, claimant and Ms. Reffel completed an 827 form requesting acceptance of an anxiety disorder as a new or omitted medical condition. (Ex. 14A). Ms. Reffel restricted claimant to modified work beginning November 1, 2017, without an end date. (*Id.*)

The employer denied claimant's new or omitted medical condition claim for anxiety disorder in February 2018. (Ex. 20).

In June 2018, Dr. Schneider, a psychologist, performed a worker-requested medical examination. (Ex. 28A). Dr. Schneider diagnosed anxiety disorder, somatic symptom disorder, and unspecified depressive disorder, all of which he attributed to the January 19, 2016, work injury. (Ex. 28A-25, -27).

In August 2018, the employer denied claimant's new or omitted medical condition claim for somatic symptom disorder and unspecified depressive disorder. (Ex. 31). Claimant requested a hearing regarding the employer's denials of his new or omitted medical condition claims.

In May 2019, a prior ALJ set aside the employer's denials of the anxiety disorder and somatic symptom disorder, but upheld the employer's denial of the unspecified depressive disorder. (Ex. 41A-12). The employer and claimant appealed the prior ALJ's order.

In September 2020, the Board found that claimant's anxiety disorder, somatic symptom disorder, and unspecified depressive disorder were compensable. *See James D. Hibbs*, 72 Van Natta 819, 829 (2020). Therefore, the Board set aside the employer's denials. *See Hibbs*, 72 Van Natta at 830.

In October 2020, the employer accepted anxiety disorder, somatic symptom disorder, and unspecified depressive disorder. (Ex. 43).

Dr. Blaylock, a physician, examined claimant in May 2021.[1] (Ex. 45). On May 14, 2021, Dr. Blaylock opined that claimant had permanent job impairment that would limit his future work to a much lighter capacity than his job at injury. (Ex. 46-1).

[1] The parties agree that Dr. Blaylock became claimant's attending physician.

In June 2021, Ms. Reffel opined that, due to the accepted psychological conditions, claimant was unable to return to his job at injury at any point during the time she treated him. (Ex. 48-2).

In September 2021, Dr. Blaylock concurred with Ms. Reffel's June 2021 opinion. (Ex. 50-2).

CONCLUSIONS OF LAW AND OPINION

Based on Ms. Reffel's December 13, 2017, authorization, the ALJ awarded additional temporary disability benefits from November 29, 2017 through April 30, 2018. Additionally, based on Dr. Blaylock's May 14, 2021, authorization, the ALJ awarded ongoing temporary disability benefits beginning April 30, 2021. The ALJ also awarded an ORS 656.383 assessed attorney fee, as well as an ORS 656.262(11)(a) penalty and penalty-related attorney fee for the late payment of these additional temporary disability benefits. The ALJ did not award additional temporary disability benefits (or related penalties or attorney fees) from June 1, 2017 through November 29, 2017, or May 1, 2018 through April 29, 2021.

On review, claimant contends that he is entitled to ongoing temporary disability benefits beginning June 1, 2017. Specifically, he raises constitutional arguments pertaining to ORS 656.262(4)(g) regarding retroactive temporary disability authorizations and ORS 656.245(2)(b)(D)(ii) regarding nurse practitioner authorizations. Alternatively, claimant asserts that he is entitled to additional temporary disability benefits from May 1, 2018 through April 29, 2021, based on Ms. Reffel's December 13, 2017, authorization.

In response, the employer contends that claimant is not entitled to additional temporary disability benefits from November 29, 2017 through April 30, 2018, or ongoing temporary disability benefits beginning April 30, 2021.[2]

Based on the following reasoning, we affirm in part and modify in part.

[2] In his cross-response/reply brief, claimant submits a December 13, 2022, Notice of Closure (labeled "Appendix A"), which he asserts renders the contentions in the employer's cross-appeal no longer viable. However, the closure notice was not admitted into the hearing record, is not an "agency order," and is not a stipulation by the parties. *See Groshong v. Montgomery Ward Co.*, 73 Or App 403 (1985) (Board may take administrative notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"); *Timothy C. Guild*, 68 Van Natta 741, 743 n 3 (2016) (Board may take administrative notice of agency orders involving the same claimant); *Dana Rosenlund*, 58 Van Natta 64, 65 (1996) (declining to take administrative notice of a Notice of Closure). Therefore, it does not satisfy the criteria for administrative notice. Consequently, we have not considered its contents.

Ongoing Temporary Disability Benefits Beginning June 1, 2017

Claimant contends that, pursuant to state and federal constitutional protections, he is entitled to ongoing temporary disability benefits beginning June 1, 2017.[3] Based on the following reasoning, we disagree with claimant's contention.

First, claimant relies on *Smothers v. Gresham Transfer Inc.*, 332 Or 83 (2001), *overruled in part on other grounds*, *Horton v. OHSU*, 359 Or 168 (2016), to assert that the regulation of nurse-practitioner-authorized time loss under ORS 656.245(2)(b)(D)(ii) and retroactively authorized time loss under ORS 656.262(4)(g), as applied, violate the Remedies Clause of Article I, section 10, of the Oregon Constitution because the statutes increase his burden of proof to establish entitlement to lost wages beyond that imposed by common law negligence. However, *Smothers* is distinguishable. In that matter, the court determined that injured workers without a remedial process available under workers' compensation laws had a constitutional right to pursue a civil action for their injury. *Smothers*, 332 Or at 136.

In contrast to *Smothers*, claimant had a remedial process and received substantial benefits under ORS chapter 656, including temporary disability compensation. (Exs. 6-4, 52). Under these particular circumstances, the application of ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g) do not violate claimant's rights under Article I, section 10 of the Oregon Constitution. ORS 656.018(1)(a); *see Smothers*, 332 Or at 136; *State ex rel Borisoff v. Workers' Comp. Board*, 104 Or App 603, 607 (1990) ("[w]e have held in other contexts that the imposition of limitations on the bringing of a workers' compensation claim does not infringe a claimant's constitutional rights"); *Donna S. Plummer*, 55 Van Natta 3859, 3861 (2003) (the claimant's Article I, section 10 rights were not violated where her claim was accepted and she received workers' compensation benefits); *Debbie I. Jensen*, 48 Van Natta 1235, 1238 (1996) (the legislature's limitation of the claimant's entitlement to retroactive temporary disability benefits did not violate her Article I, section 10 rights).

[3] Claimant raises constitutional challenges concerning HB 4138-A (2022). However, these recently enacted amendments do not apply in this matter. Further, it is not our role to issue advisory opinions. *See Mark Acuna*, 75 Van Natta 78 (2023) (declining to issue an advisory opinion regarding claim processing). Therefore, we decline to do so.

Second, claimant asserts that, pursuant to Article I, section 17 of the Oregon Constitution, he has the right to a jury trial on the question of whether he is entitled to additional temporary disability benefits. However, ORS chapter 656 does not provide for jury trials. Rather, injured workers may litigate disputes involving a "matter concerning a claim," such as entitlement to temporary disability benefits, by requesting an administrative hearing and Board review. ORS 656.283(1); ORS 656.289(3); ORS 656.704(3)(a).[4] Here, claimant pursued litigation pursuant to this statutory framework. Under these particular circumstances, claimant does not have the constitutional right to a jury trial on the question of whether he is entitled to additional temporary disability benefits. ORS 656.018(1)(a); *see Smothers*, 332 Or at 136; *Borisoff*, 104 Or App at 607; *Donald P. James*, 48 Van Natta 424, 425 n 1 (1996) (the claimant did not have a constitutional right to a jury trial).

Third, claimant argues that ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g) violate the Privileges and Immunities Clause of Article I, section 20 of the Oregon Constitution because they create, and disparately treat, two separate classes of injured workers: those who obtain statutorily sufficient time loss authorizations and those who do not. However, Oregon courts have consistently rejected statutory challenges under Article I, section 20 where the "alleged disfavored class * * * existed as a class only by virtue of the statutory scheme." *Macpherson v. Dep't of Admin. Servs.*, 340 Or 117, 130 (2006). Here, because the alleged disfavored class (injured workers without statutorily sufficient time loss authorizations) exists only by virtue of the statutory scheme, ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g) do not violate Article I, section 20 of the Oregon Constitution. *Id.*

Fourth, claimant contends that ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g) violate the "separation of powers" doctrine by unduly limiting the evidence that he may present concerning his disability. However, workers' compensation law and its benefits under ORS chapter 656 are an "exclusively legislative plan." *See State ex rel Huntington v. Sulmonetti*, 276 Or 967, 972 (1976); *Jensen*, 48 Van Natta at 1238. Therefore, the legislature's statutory requirements for temporary disability benefits do not unduly burden a judicial function. *Id.* Under these particular circumstances, ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g) do not violate the "separation of powers" doctrine. *See Smothers*, 332 Or at 125; *Sulmonetti*, 276 Or at 972; *Jensen*, 48 Van Natta at 1238.

[4] ORS 656.704(3)(a) provides that the Board and its hearings division have jurisdiction for "matters in which a worker's right to receive compensation, or the amount thereof, are directly in issue."

Fifth, claimant relies on *Koskela v. Willamette Indus., Inc.*, 331 Or 362 (2000), to assert that ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g), as applied, violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. However, *Koskela* is distinguishable. In that matter, the court determined that the post-1995 statutory scheme for determining whether a worker should receive an award of permanent total disability benefits did not provide a minimally adequate hearing procedure as required by the Fourteenth Amendment. *Id.* at 382. It was uncontested that the matter involved a "state action" for the purposes of a federal due process challenge. *Id.* at 369 n 4.

In contrast, claimant challenges a private employer's determination to withhold temporary disability payments pursuant to ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g). Although the employer's actions may have been authorized by state law, the state was not directly involved in the employer's determination to withhold time loss and the state did not compel the employer to withhold time loss. Therefore, the state action requirement of the Fourteenth Amendment challenge is not satisfied. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 US 40, 52, 119 S Ct 977, 143 L Ed 2d 130 (1999) (the state action requirement was not satisfied where Pennsylvania law authorized, but did not require, workers compensation insurers to withhold payments for disputed medical treatment).

Moreover, even assuming that the state action requirement is satisfied, claimant's due process rights have not been violated. *Koskela* pertained to whether the claimant was afforded a minimally adequate hearing process. In contrast, here, claimant asserts that ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g) provide insufficient notice regarding the state's temporary disability regulations. However, the Oregon statutory and administrative framework requires carriers and healthcare providers to provide information regarding workers' compensation laws to injured workers early in the claims process. OAR 436-010-0241(1); OAR 436-060-0015(3)(a); Workers' Compensation Division (WCD) Form 1138; WCD Form 3283.[5]

[5] Claimant objects to our consideration of WCD Forms 1138 and 3283 on the basis that there is no evidence that he "received any notice that he was required to obtain an off-work slip within 14 days of the disability * * *." However, as part of our *de novo* review, we consider the forms to the extent that they are discussed and incorporated by reference in OAR 436-010-0241(1)(b) ("all medical service providers must give a copy of Form 3283 * * * to the patient") and OAR 436-060-0015(3)(a) (requiring carriers to provide injured workers with either WCD Form 1138 or 3283 with the first disability check or earliest written correspondence). *Cf. Groshong v. Montgomery Ward Co.*, 73 Or App 43, 47 (1985) (the Board could not take administrative notice of the *Dictionary of Occupational Titles* because the dictionary was not referenced by an administrative rule). Further, OAR 436-060-0015 and the WCD forms support a conclusion that a process has been implemented to provide workers with notices of rights regarding

Specifically, WCD Form 3283 advises injured workers that written authorization from a healthcare provider is required to receive temporary disability benefits and that healthcare providers "may be limited in how long they may treat you and whether they may authorize payments for time off work." In addition, the form advises the worker to check with the healthcare provider about any limitations that may apply. Form 3283 also provides resources for workers who have questions about their claim, such as the contact information for the Ombuds Office for Oregon Workers.

Additionally, WCD Form 1138 contains the information described above, while also discussing the 180-day limitation for nurse-practitioner-authorized temporary disability. WCD Form 1138 at 2, 4, 31. Further, the form states that "if you fail to take action or if you miss a deadline to appeal claim decisions, you may lose your right to workers' compensation benefits. If you have questions about your claim or the documents you receive, call the insurer." *Id.* at 8.

Under such circumstances, we find that Oregon's statutory and administrative framework provided claimant with constitutionally adequate notice regarding temporary disability regulations.[6] *See Espinosa v. United Student Aid Funds, Inc.*, 553 F3d 1193, 1202-03 (9th Cir 2008) (quoting *D.C. Transit Systems, Inc. v. United States*, 531 F Supp 808, 812 (DDC 1982) ("Whatever is notice enough to excite attention and put the party on [their] guard and call for inquiry, is notice of everything to which such inquiry may have led"), *aff'd*, 559 US 260, 130 S Ct 1367, 176 L Ed 2d 158 (2010); *Thomson v. Or. Dep't of Human Servs.*, 325 Or App 442, 443-44 (2023). Therefore, we find that ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g), as applied, do not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *See Sullivan*, 526 US at 52; *Espinosa*, 553 F3d at 1202-03; *State v. Lawson/James*, 352 Or 724, 747 (2012); *Thomson*, 325 Or App at 443-44.

---

temporary disability benefits and carriers' claim processing obligations. Claimant's assertion that the employer did not follow such procedures may be relevant to an unreasonable claim processing issue, but does not establish that the process itself is unconstitutional.

[6] Claimant contends that his due process rights were violated because the record does not establish that he actually received notice regarding Oregon's temporary disability regulations. Claimant, who was represented by counsel at the hearing, testified that neither the employer nor its claims processing agent informed him that only certain types of medical providers can authorize temporary disability. (Tr. 15). However, this testimony does not establish that he was not provided with the legally required forms. OAR 436-010-0241(1); OAR 436-060-0015(3)(a); *see State v. Lawson/James*, 352 Or 724, 747 (2012) (noting that in the context of a due process challenge, it is the challenging party who "generally bears the initial burden of proof"); *Thomson*, 325 Or App at 444.

Finally, claimant asserts that ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g), as applied, violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because they create and disparately treat two separate classes of injured workers: those who obtain statutorily sufficient time loss authorizations and those who do not.

Claimant concedes that the foregoing statutes fall under a "rational basis" theory of review. Under a "rational basis" theory of review, a legislative classification must be upheld against an equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. *See Heller v. Doe*, 509 US 312, 320, 113 S Ct 2637, 125 L Ed 2d 257 (1993); *Qwest Corp. v. PUC*, 205 Or App 370, 385-86 (2006). The burden, therefore, falls on the one attacking the legislative arrangement to "negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller*, 509 US at 320-21 (citation omitted).

Here, it is reasonably conceivable that the legislature enacted ORS 656.245(2)(b)(D)(ii) with the intent of limiting the type of medical practitioners authorized to serve as an "attending physician" (and authorized to issue work restrictions) to duly qualified licensees. Additionally, it is reasonably conceivable that the legislature enacted ORS 656.262(4)(g) with the intent of "capping" past time loss damages in order to limit potentially unknown liability for insurers and employers. Therefore, under these particular circumstances, ORS 656.245(2)(b)(D)(ii) and ORS 656.262(4)(g), as applied, do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Consequently, for the reasons expressed above, as well as those contained in the ALJ's order, claimant is not entitled to ongoing temporary disability benefits beginning June 1, 2017. Accordingly, we affirm that portion of the ALJ's order that did not award additional temporary disability benefits from June 1, 2017 through November 29, 2017.

Temporary Disability Benefits from May 1, 2018 through April 29, 2021

Claimant asserts that he is entitled to additional temporary disability benefits from May 1, 2018 through April 29, 2021, based on Ms. Reffel's December 13, 2017, authorization. Citing *Dedera v. Raytheon Eng'rs & Constr.*, 200 Or App 1, 7, *rev den*, 339 Or 406 (2005), claimant argues that Ms. Reffel's December 13, 2017, authorization continued beyond the 180 days allowed under ORS

656.245(2)(b)(D)(ii).[7] However, *Dedera* is distinguishable because that matter concerned a physician who issued an open-ended time loss authorization prior to losing his status as the claimant's "attending physician," not a nurse practitioner. 200 Or App at 7. In contrast, as a nurse practitioner, Ms. Reffel lacked statutory authority to authorize time loss beyond the period allowed under ORS 656.245(2)(b)(D)(ii). ORS 656.262(4)(h); *see Ana Galvan*, 67 Van Natta 1055, 1057 (2015) (finding the carrier's termination of temporary disability benefits justified under ORS 656.262(4)(h) where the claimant's physician assistant lacked statutory authority to authorize temporary disability benefits after 30 days under ORS 656.245(2)(b)(B)).[8] Therefore, claimant is not entitled to additional temporary disability benefits from May 1, 2018 through April 29, 2021.

Under such circumstances, for the reasons expressed above, as well as those expressed in the ALJ's order, claimant is not entitled to additional temporary disability benefits from May 1, 2018 through April 29, 2021. Accordingly, we affirm this portion of the ALJ's order.

Temporary Disability Benefits from April 30, 2021 through May 13, 2021

We turn to the employer's arguments on cross-appeal.[9] The employer contends that claimant is not entitled to temporary disability benefits from April 30, 2021 through May 13, 2021, because Dr. Blaylock's May 14, 2021, chart note

[7] ORS 656.245(2)(b)(D)(ii) provides that a nurse practitioner "may authorize the payment of temporary disability benefits for a period not to exceed 180 days from the date of the first visit on the initial claim."

[8] ORS 656.262(4)(h) provides:

> "The worker's disability may be authorized only by a person described in ORS 656.005(12)(b)(B) or 656.245 for the period of time permitted by those sections. The insurer or self-insured employer may unilaterally suspend payment of temporary disability benefits to the worker at the expiration of the period until temporary disability is reauthorized by an attending physician or nurse practitioner authorized to provide compensable medical services under ORS 656.245."

[9] The employer contends that claimant did not timely request a hearing regarding his entitlement to temporary disability benefits for November 29, 2017 through April 30, 2018. However, Ms. Reffel's December 3, 2017, "work release," which authorized temporary disability benefits for this time period, was related to claimant's anxiety disorder. (Ex. 14A). The employer initially denied claimant's anxiety disorder, and did not accept it until October 21, 2020, when it reopened the claim after the Board found the condition compensable. (Exs. 20, 43); *see James D. Hibbs*, 72 Van Natta 819 (2020). Therefore, claimant's July 19, 2021, hearing request was timely because it was filed within two years of the date that temporary disability benefits were due, which was 14 days after the Board's order became final. ORS 656.319(6); OAR 436-060-0150(4)(a)(H); *see French-Davis v. Grand Central Bowl*, 186 Or App 280,

did not authorize retroactive temporary disability benefits. In response, claimant asserts that he is entitled to retroactive temporary disability benefits because Dr. Blaylock ultimately concurred with Ms. Reffel's June 2021 opinion that, during the time she treated claimant, he was unable to return to his job at injury. (Exs. 48-2, 50-2). Based on the following reasoning, we agree with the employer's contention.

Pursuant to former ORS 656.262(4)(g), a retroactive authorization of temporary disability benefits was only allowed for up to 14 days before its issuance. *See Menasha Corp. v. Crawford*, 332 Or 404, 416 (2001). Further, an attending physician authorization that is not contemporaneous with the disputed period of temporary disability benefits cannot be the basis of an inference under OAR 436-060-0020. *See Reed v. Labor Force*, 155 Or App 595, 599 (1998) (the claimant was entitled only to those temporary disability benefits to which there was contemporaneous evidence of entitlement).

Here, Dr. Blaylock's May 14, 2021, chart note constituted an open-ended release. (Ex. 46); *see Lederer v. Viking Freight, Inc.*, 193 Or App 226, 234, *recons*, 195 Or App 94 (1994) (when an objectively reasonable carrier would understand contemporaneous medical reports to excuse an injured worker from regular work, the carrier is obligated to pay temporary disability benefits); *Ryan Marchand*, 74 Van Natta 179, 184 (2022) (the claimant was entitled to ongoing temporary disability benefits where an attending physician's authorization was open-ended). However, there was no indication in Dr. Blaylock's May 2021 chart notes that he intended to authorize retroactive temporary disability benefits. Further, to the extent that Dr. Blaylock's September 2021 concurrence opinion was intended to authorize retroactive temporary disability benefits for the disputed period, the authorization was not contemporaneous evidence of entitlement. (Ex. 50-2); *see David M. Williams*, 69 Van Natta 593, 604 (2017) (while an attending physician's subsequent recollections about past intentions might establish, at best, a retroactive authorization subject to the statutory 14-day limitation, such recollections do not establish a contemporaneous authorization for temporary

---

284 (2003) (to determine whether a request for hearing was timely filed pursuant to ORS 656.319(6), we first identify what specific action or inaction amounted to the alleged failure to process or incorrectly process the claim); *Armando Morin*, 68 Van Natta 1760, 1762 (2016) (the claimant's hearing request was timely because it was filed within two years of the date that such benefits were due pursuant to an ALJ's order).

Under such circumstances, for the foregoing reasons and those articulated in the ALJ's order, claimant is entitled to temporary disability benefits from November 29, 2017 through April 30, 2018. Accordingly, we affirm that portion of the ALJ's order.

disability benefits). Therefore, claimant is not entitled to temporary disability benefits from April 30, 2021 through May 13, 2021. *See Reed*, 155 Or App at 599; *Williams*, 69 Van Natta at 604.

Consequently, for the reasons expressed above, claimant is not entitled to additional temporary disability benefits from April 30, 2021 through May 13, 2021. Accordingly, we modify the ALJ's order. In lieu of the ALJ's temporary disability award beginning April 30, 2021, we find that claimant is entitled to temporary disability benefits from May 14, 2021, until those benefits can be properly terminated. [10]

Penalties and Attorney Fees

Because we have reduced the ALJ's temporary disability award (awarding temporary disability benefits beginning May 14, 2021, rather than April 30, 2021), we similarly modify the ALJ's order by reducing the ALJ's ORS 656.262(11)(a) penalty award consistent with the reduction of the "amounts then due" pursuant to this order. However, we affirm those portions of the ALJ's order that awarded an ORS 656.262(11)(a) penalty-related attorney fee and an ORS 656.383 assessed attorney fee.[11]

[10] The employer asserts that claimant is not entitled to additional temporary disability benefits from May 14, 2021, until such benefits can be properly terminated because Dr. Blaylock's May 14, 2021, authorization was not related to claimant's compensable anxiety disorder, somatic symptom disorder, and unspecified depressive disorder conditions. However, in his May 14, 2021, chart note, Dr. Blaylock stated that "most of [claimant's] impairment is related to his now accepted anxiety, somatic syndrome, and his depression." (Ex. 46-1). Under these particular circumstances, Dr. Blaylock's temporary disability authorization was related, at least in part, to his compensable anxiety disorder, somatic symptom disorder, and unspecified depressive disorder. Therefore, claimant is entitled to additional temporary disability benefits from May 14, 2021, until those benefits can be properly terminated. *See Vincent O. Robison*, 67 Van Natta 938, 939 (2015) (temporary disability benefits awarded when attending physician's authorization pertained in part to an unclaimed asthmatic condition, but also pertained to the accepted conjunctivitis condition).

[11] We acknowledge that attorney fees involving ORS 656.262(11)(a) shall be in a reasonable amount that is proportionate to the benefit to claimant and that the benefits to claimant (*i.e.*, the temporary disability and penalty awards) have been reduced from those which were granted by the ALJ. Nonetheless, after considering the factors set forth in OAR 438-015-0010(4) and applying them to this case, we find that the attorney fees awarded by the ALJ pursuant to 656.262(11)(a) and ORS 656.383 constitute reasonable attorney fees for claimant's attorney's services at the hearing level concerning the temporary disability and penalty issues. In reaching this conclusion, we have given primary consideration to the results achieved and to the time devoted to the aforementioned issues (as represented by the hearing record). *See* OAR 438-015-0110(2).

Claimant's counsel is entitled to an assessed attorney fee for services on review regarding the successful defense of part of the ALJ's temporary disability benefits award. ORS 656.382(2); *see Justin A. Swint*, 73 Van Natta 504, 511 (2021) (an attorney fee under ORS 656.382(2) is awardable if part of a compensation award is not disallowed or reduced). Claimant has requested "bifurcation" of the attorney fee award from the merits of the temporary disability, penalties, and penalty-related attorney fee issues. *See* OAR 438-015-0125. Under such circumstances, we award a reasonable assessed fee, in an amount to be determined in Workers' Compensation Board (WCB) Case No. 22-00010BF (payable by the employer) after this order becomes final.

ORDER

The ALJ's order dated March 4, 2022, as reconsidered on May 3, 2022, is affirmed in part and modified in part. In lieu of the ALJ's temporary disability award, claimant is awarded temporary disability benefits from November 29, 2017 through April 30, 2018, and from May 14, 2021 until those benefits can be properly terminated. The ALJ's ORS 656.262(11)(a) penalty award is reduced accordingly. For services on review regarding the temporary disability issue, claimant's attorney is awarded an assessed fee, payable by the employer, to be determined in WCB No. 22-00010BF. The remainder of the ALJ's order is affirmed.

Entered at Salem, Oregon on October 17, 2023